

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.04.2019

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No.11744 of 2019
W.M.P.No.11953 of 2019

A.Pari .. Petitioner

Vs.

1.The Election Commission of India,
rep by its Chief Election Commissioner,
Nirvan Chadhan
Asoka Road, New Delhi.

2.State of Tamil Nadu represented by
Chief Election Commissioner,
Fort St George, Secretariat,
Chennai 600 009.

3.The Returning Officer,
District Collector of Dindigul
Dindigul Constituency 624 004.

4.Manzoor Alikhan .. Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, issuance of a Writ of Mandamus, directing the respondent 3/Returning Officer of Dindigul Constituency to reject the Nomination Form 26 and affidavit filed by the candidate Manzoor Alikhan aged 57 son of Abdul Salam resident of 113, West Periarpathai, Choolaimedu, Chennai 600 094 to contest in the ensuing Lok Sabha Election to be held on 18.04.2019.

For Petitioner : Mr.A.Pari (Party-in-Person)

For R1 to R3 : Mr.Niranjan Rajagopalan

ORDER

(Order of this Court was made by S.MANIKUMAR, J.)

Mr.A.Pari, Party-in-Person, has filed the instant writ

petition, for a Mandamus, directing the Returning Officer of Dindigul Constituency, the 3rd respondent herein, to reject the Nomination Form 26 and affidavit filed by the candidate Mr.Manzoor Alikhan, aged 57, son of Abdul Salam, a resident of 113, West Periarpathai, Choolaimedu, Chennai, to contest in the ensuing Lok Sabha Election, to be held on 18.04.2019.

2. Supporting the prayer sought for, Mr.A.Pari, Party-in-Person, has submitted that Cine Actor, Manzoor Alikhan, has submitted his nomination to contest in Dindigul Parliamentary Constituency, for the election to be held on 18.04.2019. According to the Party-in-Person, Cine Actor, Mansoor Alikhan, has given false details in his affidavit submitted to the Election Officer. Before the learned Additional District and Sessions Judge, Fast Tract Court No.IV, Chennai, the contestant has filed an affidavit, stating that his age as 57, whereas, in the affidavit filed before the Election Authorities, he has stated his age as 56.

3. Before the Election Authorities, the contestant, has concealed the registration of Crime No.2915/2017, under Sections 144(47), 420, 468, 471 and 506 IPC and obtained bail in the said case, by concealing materials. According to him, the contestant, in his declaration, has mentioned a property belongs to him. He has put up a construction of 5660 sq.feet., whereas, he has declared the extent of construction only as 2830 sq.feet.

4. Party-in-Person has further submitted that the property, declared by the contestant, as owned by him, originally belonged to the Party-in-Person and others and that the Civil Court has granted a decree, in their favour. Cine Actor, Manzoor Alikhan, has furnished false particulars, before the Civil Court, for which, action under Section 340 of the Criminal Procedure Code, was sought for.

5. Mr.A.Pari, Party-in-Person, has further submitted that though a complaint, dated 06.04.2019, has been given to the Election Commission of India, represented by its Chief Election Commissioner, New Delhi and State of Tamil Nadu represented by Chief Election Commissioner, Chennai/respondents 1 and 2 herein, no action has been taken. In the abovesaid circumstances, he has filed the instant writ petition, for the relief, as stated supra.

6. Opposing the prayer sought for, Mr.Niranjana Rajagopalan, learned counsel for Election Commission of India, submitted that in the light of Constitutional Provision under Article 329(b), instant writ petition is not maintainable in law. He further submitted that as per Section 125A of the Representation of the People Act, 1951, a candidate, who himself or through his proposer, with intent to be elected in an election,- (i) fails

to furnish information relating to sub-section (1) of section 33A; or (ii) give false information which he knows or has reason to believe to be false; or (iii) conceals any information, in his nomination paper delivered under sub-section (1) of section 33 or in his affidavit which is required to be delivered under sub-section (2) of section 33A, as the case may be, shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

7. Referring to Section 8 of the Representation of the People Act, 1951, learned counsel for Election Commission of India submitted that the said provision, is not attracted, for the reasons that the contestant, has not been convicted for any offence as provided therefor.

8. Inviting the attention of this Court to the recent judgment of the Hon'ble Supreme Court in Public Interest Foundation and others vs. Union of India, reported in 2019 (3) SCC 224, Mr.Niranjan Rajagopalan, learned Election Commission of India, submitted that, when a public interest litigation was filed with a prayer to lay down disqualifications for MP's and MLA's, against whom charges have been framed for heinous and grievous offences, the Hon'ble Supreme Court, rejected the said prayer, by observing that, Section 8 of the Representation of the People Act, 1951, as enumerated the grievance for disqualification and that there is no new ground to be added or introduced. For the abovesaid reasons, he prayed for dismissal of the instant writ petition.

9. Heard Mr.A.Pari, Party-in-Person and Mr.Niranjan Rajagopalan, learned counsel for Election Commission of India and perused the materials available on record.

10. Insofar as, preliminary objection for maintainability of the writ petition filed for a Mandamus, we deem it fit to extract Article 329(b) of the Constitution of India.

Article 329(b):

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

11. In view of the Statutory bar, instant writ petition filed for a Mandamus, to reject the nomination papers, is not maintainable. Even taking it for granted, that the writ petition is maintainable, on the facts and circumstances of the present case, we deem it fit to consider, some of the orders passed by

this Court on the First Information Report, said to have been concealed by Cine Actor, Mr.Manzoor Alikhan and on the aspect of filing of false affidavit alleged to have been filed by Mr.Manzoor Alikhan before the City Civil Court, and the request of the petitioner to take action under Section 340 of the Criminal Procedure Code.

12. Let us consider, the orders passed by this Court, wherein, Ms.Abitha Banu and Mr.A.Mansoor Alikhan, have jointly filed Crl.O.P.No.1125 of 2018, to quash the FIR No.2915 of 2017, dated 21.12.2017 on the file of Inspector of Police, Choolaimedu Police Station, Chennai, on the basis of the complaint dated 08.01.2017, given by Mr.Pari, Party-in-Person.

13. Complaint relates to a property in S.Nos.3 & 4, Block No.1, measuring 3375 sq.ft. in Thirukumarapuram, Kodambakkam, which is alleged to have been belonged to one Mr.S.P.Appavoo, father of Mr.A.Pari (Party-in-Person).

14. After considering the rival submission of the parties therein, namely, Ms.Abitha Banu and Mr.A.Mansoor Alikhan; State represented by Inspector of Police, Choolaimedu Police Station, Chennai; and Mr.Pari (Party-in-Person), vide order, dated 01.08.2018, a learned Single Judge, dismissed Crl.O.P.No.1125 of 2018. Relevant paragraph Nos.2 to 8, are extracted hereunder:-

"2. The second respondent [de facto complainant] gave a complaint to the first respondent police and thereafter, filed Crl.O.P.No.23632 of 2017 under Section 482 Cr.P.C. for a direction to the police to register an FIR. Based on the template order passed by this Court directing the first respondent police to register an FIR if the complaint discloses commission of a cognizable offence, the police have registered a case in Cr.No.2915 of 2017 on 21.12.2017 under Sections 447, 420, 468, 471, 506(i) IPC against Abitha Banu [A1] and her husband Mansoor Alikhan [A2] for quashing which, the accused are before this Court.

3. Heard Mr.A.R.Nixon, learned counsel for the accused, Mr.Pari, the second respondent and Mr.C.Raghavan, learned Government Advocate [Crl.Side] for the first respondent-State.

4. To appreciate the contention of the accused, it may be necessary to briefly state the averments in the complaint. The property in question at plot no.5 in 4th Street, Thirukumarapuram, Chennai measuring 3375 sq.ft. originally belonged to one Appavoo, the father of Pari; in that property, there is a house in the

middle and vacant land around; Appavoo gave a Power of Attorney dated 18.05.1998 to one Gunasekaran in respect of 1,000 sq.ft. in the said property, pursuant to which, Gunasekaran was in the occupation of that portion of the property since 1998; the accused, being neighbours, requested Appavoo to permit them to park their car in the vacant portion, which Appavoo permitted; Appavoo entered into a sale agreement on 18.04.2000 with the accused agreeing to sell 1,480 sq.ft. for a total sale consideration of Rs.4 lakhs and received an advance of Rs.1 lakh; Pari, the de facto complainant has signed as a witness in the said sale agreement; Appavoo issued a legal notice to the accused cancelling the agreement; the accused had taken Appavoo and Gunasekaran forcibly on 11.08.2003 to the Office of the Sub Registrar and had made them execute a Power of Attorney in favour of Abitha Banu [A2]. This is the sum and substance of the allegation of Pari in the FIR.

5. After the execution of the sale, the accused appeared to have been put in possession of the property and they built a house thereon. Appavoo filed a suit in C.S.No.207 of 2010 in the High Court for a declaration that the said property belongs to him and for a direction to the accused to demolish the superstructure put up in the said property and consequently, hand over vacant possession of the property. The said suit was transferred to the City Civil Court, Chennai on account of enlargement of pecuniary jurisdiction of the City Civil Court, pursuant to which, the case has been renumbered as O.S.No.10171 of 2010 and the matter is still pending. Admittedly, Appavoo died and Pari and other heirs have been impleaded as legal representatives in the said suit. The accused have filed their written statement and trial has begun with the examination of Pari as a witness.

6. Pari, the de facto complainant contended that the police should proceed further with the investigation and collect materials to establish that Appavoo was forcibly made to execute the Power of Attorney on 11.08.2003 in favour of Abitha Banu [A2].

7. The fact remains that when Appavoo was alive, he himself has filed only a suit for a declaration that the property belongs to him and after his death, Pari has given the present complaint in the year 2017 alleging that in the year 2003, his father was made to

forcibly execute the Power of Attorney.

8. In the opinion of this Court, the present FIR is clearly an abuse of process of law and therefore, this petition is allowed and the prosecution in Cr.No.2915 of 2017 is hereby quashed. Consequently, connected miscellaneous petitions are closed."

15. Insofar as the allegation of filing false affidavit before the Civil Court, Mr.Pari, Ms.A.Rani and Ms.P.Nagalakshmi, joined together and filed CrI.O.P.Sr.No.6139 of 2019, praying for a direction to initiate proceedings under Section 340(195) Criminal Procedure Code, for the alleged offences committed by respondents therein, under Sections 181, 193, 196 and 211 of IPC and further prayed for registration of FIR and arrest the respondents therein in CrI.O.P.Sr.No.6139 of 2019. After hearing the Party-in-Person, a learned Single Judge, vide order, dated 18.02.2019, dismissed the said petition, as hereunder:-

"This petition has been filed praying that the application filed by the respondents petition IA 6280/2018, IA 7657/2018, IA 14529/2018 under Section 340(195) may kindly accused persons 1 to 8 Criminal offence IPC 181 and 193 and 196 and 211 FIR registered and arrested Criminal be rejected petition.

2. It is seen that the petitioners have filed this petition seeking direction to lodge a complaint under Section 340 Cr.P.C. As the offence committed in various courts, therefore no direction can be issued by this Court. Further it is also seen that some petitions filed by the petitioner are dismissed by the civil court, as against which the appeal suit is also pending.

3. Therefore, this petition filed before this Court is not maintainable as such this Criminal Original Petition is dismissed as not maintainable at the SR stage itself."

16. Thus, from the above, it could be seen that the facts stated in the supporting affidavit filed to the instant writ petition, were already the subject matter in the orders made in CrI.O.P.No.1125 of 2018, dated 01.08.2018 and CrI.O.P.Sr.No.6139 of 2019, dated 18.02.2019.

17. Orders made in the abovesaid criminal original petitions, cannot be reviewed, even by a Hon'ble Division Bench of this Court. The only course open to the petitioner/party-in-person, is to approach the Hon'ble Supreme Court, if he is so

aggrieved. It is not open to the petitioner/party-in-person, to canvass the same points, in the writ petition filed before us, seeking for a writ of mandamus.

18. Added further, Section 100 of the Representation of the People Act, 1951, deals with grounds for declaring election to be void. As per Section 100(1)(d) of the said Act, subject to the provisions of sub-section (2), if the High Court is of opinion, that the result of the election, insofar as it concerns a returned candidate, has been materially affected, (i) by the improper acceptance or any nomination, or (ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or (iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or (iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act, then the High Court shall declare the election of the returned candidate to be void.

19. If Mr. Manzoor Alikhan, is elected, the petitioner is not remediless. In the light of Section 100(1)(d) of the Representation of the People Act, 1951, the petitioner can always approach this Court, by way of election petition for a declaration of the election results of Mr. Manzoor Alikhan, to be void.

20. Section 8 of the Representation of the People Act, 1951, deals with disqualification on conviction for certain offences. Section 8-A of the said Act, deals with disqualification on the ground of corrupt practices. Sections 8 and 8(A) of the said Act, are extracted hereunder:-

"8. Disqualification on conviction for certain offences.-(1) A person convicted of an offence punishable under-

(a) Section 153-A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or Section 171-E (offence of bribery) or Section 171-F (offence of undue influence or personation at an election) or sub-section (1) or sub-section (2) of Section 376 or Section 376-A or Section 376-B or Section 376-C or Section 376-D (offences relating to rape) or Section 498-A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of Section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly

engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code (45 of 1860); or

(b) the Protection of Civil Rights Act, 1955 (22 of 1955), which provides for punishment for the preaching and practice of "untouchability", and for the enforcement of any disability arising therefrom; or

(c) Section 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962 (52 of 1962); or

(d) Sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or

(e) the Foreign Exchange (Regulation) Act, 1973 (46 of 1973); or

(f) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or

(g) Section 3 (offence of committing terrorist acts) or Section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or

(h) Section 7 (offence of contravention of the provisions of Sections 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988); or

(i) Section 125 (offence of promoting enmity between classes in connection with the election) or Section 135 (offence of removal of ballot papers from polling stations) or Section 135-A (offence of booth capturing) or clause (a) of sub-section (2) of Section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of this Act; or

(j) Section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991, or

(k) Section 2 (offence of insulting the Indian National Flag or the Constitution of India) or Section

3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971); or

(l) the Commission of Sati (Prevention) Act, 1987 (3 of 1988); or

(m) the Prevention of Corruption Act, 1988 (49 of 1988); or

(n) the Prevention of Terrorism Act, 2002 (15 of 2002);

shall be disqualified, where the convicted person is sentenced to—

(i) only fine, for a period of six years from the date of such conviction;

(ii) imprisonment, from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(2) A person convicted for the contravention of—

(a) any law providing for the prevention of hoarding or profiteering; or

(b) any law relating to the adulteration of food or drugs; or

(c) any provisions of the Dowry Prohibition Act, 1961 (28 of 1961);

and sentenced to imprisonment for not less than six months, shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years other than any offence referred to in sub-section (1) or sub-section (2) shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(4) Notwithstanding anything in sub-section (1), sub-section (2) and sub-section (3) a disqualification under either sub-section shall not, in the case of a person who on the date of the conviction is a member of Parliament or the legislature of a State, take

effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

Explanation.—In this section—

(a) "law providing for the prevention of hoarding or profiteering" means any law, or any order, rule or notification having the force of law, providing for—

(i) the regulation of production or manufacture of any essential commodity;

(ii) the control of price at which any essential commodity may be brought or sold;

(iii) the regulation of acquisition, possession, storage, transport, distribution, disposal, use or consumption of any essential commodity;

(iv) the prohibition of the withholding from sale of any essential commodity ordinarily kept for sale;

(b) "drug" has the meaning assigned to it in the Drugs and Cosmetics Act, 1940 (23 of 1940);

(c) "essential commodity" has the meaning assigned to it in the Essential Commodities Act, 1955 (10 of 1955);

(d) "food" has the meaning assigned to it in the Prevention of Food Adulteration Act, 1954 (37 of 1954).

8-A. Disqualification on ground of corrupt practices.—(1) The case of every person found guilty of a corrupt practice by an order under Section 99 shall be submitted, as soon as may be within a period of three months from the date such order takes effect, by such authority as the Central Government may specify in this behalf, to the President for determination of the question as to whether such person shall be disqualified and if so, for what period:

Provided that the period for which any person may be disqualified under this sub-section shall in no case exceed six years from the date on which the order made in relation to him under Section 99 takes effect.

(2) Any person who stands disqualified under Section 8-A of this Act as it stood immediately before

the commencement of the Election Laws (Amendment) Act, 1975 (40 of 1975), may, if the period of such disqualification has not expired, submit a petition to the President for the removal of such disqualification for the unexpired portion of the said period.

(3) Before giving his decision on any question mentioned in sub-section (1) or on any petition submitted under sub-section (2), the President shall obtain the opinion of the Election Commission on such question or petition and shall act according to such opinion."

21. Reading of the above, makes it clear that disqualification is attracted only on conviction, as explained in the said Act. As rightly contended by Mr.Niranjan Rajagopalan, learned counsel for Election Commission of India, Mr.Manzoor Alikhan, has not been convicted for any of the offences, as stated in Section 8 of the Representation of the People Act, 1951 and therefore no disqualification is attracted. In the case on hand, even FIR in Crime No.2915 of 2017 on the file of the Inspector of Police, Choolaimedu Police Station, Chennai, for the alleged offences, under Section 482 of Cr.P.C., has been quashed by this Court in Crl.O.P.No.1125 of 2018.

22. Added further, on the issue, as to whether, pendency of criminal cases, where charge sheet has been filed for heinous and grievous offence, could be taken as disqualification to contest in a election for MP's and MLA's, the Hon'ble Supreme Court in Public Interest Foundation's case (cited supra) discussed the same and ultimately, at paragraph No.25, ordered that

"thus the prescription as regards disqualification is complete is in view of the language employed in Section 7(b) read with Sections 8 to 10-A of the Act. It is clear as noon day and there is no ambiguity. The legislature has very clearly enumerated the grounds for disqualification and the language of the said provision leaves no room for any new ground to be added or introduced."

23. It is also worthwhile to consider paragraph Nos.2 to 24 of the said judgment, which are reproduced hereunder:

"2. The constitutional functionaries, who have taken the pledge to uphold the constitutional principles, are charged with the responsibility to ensure that the existing political framework does not get tainted with the evil of corruption. However, despite this heavy mandate prescribed by our Constitution, our Indian democracy, which is the world's largest democracy, has seen a steady increase

in the level of criminalisation that has been creeping into the Indian polity. This unsettlingly increasing trend of criminalisation of politics, to which our country has been a witness, tends to disrupt the constitutional ethos and strikes at the very root of our democratic form of government by making our citizenry suffer at the hands of those who are nothing but a liability to our country.

3. The issue that emerges for consideration before this Bench is whether disqualification for membership can be laid down by the Court beyond Articles 102(a) to (d) and the law made by Parliament under Article 102(e). A three-Judge Bench hearing the matter was of the view [Public Interest Foundation v. Union of India, 2016 SCC OnLine SC 1731] that this question is required to be addressed by the Constitution Bench under Article 145(3) of the Constitution. Be it stated, a submission was advanced before the three-Judge Bench that the controversy was covered by the decision in Manoj Narula v. Union of India [Manoj Narula v. Union of India, (2014) 9 SCC 1]. The said submission was not accepted because of the view expressed by Madan B. Lokur, J. in his separate judgment.

4. In the course of hearing, the contour of the question was expanded with enormous concern to curb criminalisation of politics in a democratic body polity. The learned counsel for the petitioners submitted that having regard to the rise of persons with criminal antecedents, the fundamental concept of decriminalisation of politics should be viewed from a wider spectrum and this Court, taking into consideration the facet of interpretation, should assume the role of judicial statesmanship. Mr K.K. Venugopal, learned Attorney General for India and other learned counsel, per contra, would submit that there can be no denial that this Court is the final arbiter of the Constitution and the Constitution empowers this wing of the State to lay down the norms of interpretation and show judicial statesmanship but the said judicial statesmanship should not ignore the fundamental law relating to separation of powers, primary responsibility conferred on the authorities under the respective powers and the fact that no authority should do anything for which the power does not flow from the Constitution. In essence, the submission of Mr Venugopal is that the Court should not cross the "Lakshman Rekha". Resting on the fulcrum

of constitutional foundation and on the fundamental principle that if the Court comes to hold that it cannot legislate but only recommend for bringing in a legislation, as envisaged under Article 102(1)(e) of the Constitution, it would not be appropriate to take recourse to any other method for the same pure reason that what cannot be done directly, should not be done indirectly. We shall advert to the said submission at a later stage.

5. Article 102 reads as follows:

"102. Disqualifications for membership.—(1) A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

(a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

Explanation.—For the purposes of this clause a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.

(2) A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule."

6. In this context, we may also refer to Article 191 of the Constitution that deals with disqualifications for membership. It is as follows:

"191. Disqualifications for membership.—(1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—

(a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

Explanation.—For the purposes of this clause, a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State specified in the First Schedule by reason only that he is a Minister either for the Union or for such State.

(2) A person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule."

7. On a perusal of both the articles, it is clear as crystal that as regards disqualification for being chosen as a Member of either House of Parliament and similarly disqualification for being chosen or for being a Member of Legislative Assembly or Legislative Council of a State, the law has to be made by Parliament.

. In Lily Thomas v. Union of India [Lily Thomas v. Union of India, (2013) 7 SCC 653 : (2013) 3 SCC (Civ) 678 : (2013) 3 SCC (Cri) 641 : (2013) 2 SCC (L&S) 811] , it has been held: (SCC p. 669, para 26)

"26. Articles 102(1)(e) and 191(1)(e) of the Constitution, on the other hand, have conferred specific powers on Parliament to make law providing disqualifications for membership of either House of Parliament or Legislative Assembly or Legislative Council of the State other than those specified in sub-clauses (a), (b), (c) and (d) of clause (1) of Articles 102 and 191 of the Constitution. We may note

that no power is vested in the State Legislature to make law laying down disqualifications of membership of the Legislative Assembly or Legislative Council of the State and power is vested in Parliament to make law laying down disqualifications also in respect of Members of the Legislative Assembly or Legislative Council of the State. For these reasons, we are of the considered opinion that the legislative power of Parliament to enact any law relating to disqualification for membership of either House of Parliament or Legislative Assembly or Legislative Council of the State can be located only in Articles 102(1)(e) and 191(1)(e) of the Constitution and not in Article 246(1) read with Schedule VII List I Entry 97 and Article 248 of the Constitution. We do not, therefore, accept the contention of Mr Luthra that the power to enact sub-section (4) of Section 8 of the Act is vested in Parliament under Article 246(1) read with Schedule VII List I Entry 97 and Article 248 of the Constitution, if not in Articles 102(1)(e) and 191(1)(e) of the Constitution."

We have no hesitation in saying that the view expressed above in Lily Thomas [Lily Thomas v. Union of India, (2013) 7 SCC 653 : (2013) 3 SCC (Civ) 678 : (2013) 3 SCC (Cri) 641 : (2013) 2 SCC (L&S) 811] is correct, for Parliament has the exclusive legislative power to lay down disqualification for membership.

9. In Manoj Narula [Manoj Narula v. Union of India, (2014) 9 SCC 1], the question centred around the interpretation of Article 75 of the Constitution. The core issue pertained to the legality of persons with criminal background and/or charged with offences involving moral turpitude to be appointed as ministers in the Central and the State Governments. The majority referred to the constitutional provisions, namely, Articles 74, 75, 163 and 164, adverted to the doctrine of implied limitation and, in that context, opined thus: (SCC p. 45, para 64)

"64. On a studied scrutiny of the ratio of the aforesaid decisions, we are of the convinced opinion that when there is no disqualification for a person against whom charges have been framed in respect of heinous or serious offences or offences relating to corruption to contest the election, by interpretative process, it is difficult to read the prohibition into Article 75(1) or, for that matter, into Article 164(1) to the powers of the Prime Minister or the Chief Minister in such a manner. That would come within the

criterion of eligibility and would amount to prescribing an eligibility qualification and adding a disqualification which has not been stipulated in the Constitution. In the absence of any constitutional prohibition or statutory embargo, such disqualification, in our considered opinion, cannot be read into Article 75(1) or Article 164(1) of the Constitution."

10. There has been advertence to the principle of constitutional silence or abeyance and, in that context, it has been ruled that it is not possible to accept that while interpreting the words "advice of the Prime Minister", it can legitimately be inferred that there is a prohibition to think of a person as a minister if charges have been framed against him in respect of heinous and serious offences including corruption cases under the criminal law. Thereafter, the majority addressed the concepts of "constitutional morality", "constitutional governance" and "constitutional trust" and analysed the term "advice" employed under Article 75(1) and stated that formation of an opinion by the Prime Minister in the context of Article 75(1) is expressed by the use of the said word because of the trust reposed in the Prime Minister under the Constitution and the said advice, to put it differently, is a constitutional advice. Reference was made to the debate in the Constituent Assembly which had left it to the wisdom of the Prime Minister because of the intrinsic faith in him. Discussing further, it has been stated: (Manoj Narula case [Manoj Narula v. Union of India, (2014) 9 SCC 1] , SCC p. 54, para 96)

"96. ... At the time of framing of the Constitution, the debate pertained to conviction. With the change of time, the entire complexion in the political arena as well as in other areas has changed. This Court, on number of occasions, as pointed out hereinbefore, has taken note of the prevalence and continuous growth of criminalisation in politics and the entrenchment of corruption at many a level. In a democracy, the people never intend to be governed by persons who have criminal antecedents. This is not merely a hope and aspiration of citizenry but the idea is also engrained in apposite executive governance."

And again: (SCC p. 55, para 98)

"98. ... That the Prime Minister would be giving apposite advice to the President is a legitimate

constitutional expectation, for it is a paramount constitutional concern. In a controlled Constitution like ours, the Prime Minister is expected to act with constitutional responsibility as a consequence of which the cherished values of democracy and established norms of good governance get condignly fructified. The Framers of the Constitution left many a thing unwritten by reposing immense trust in the Prime Minister. The scheme of the Constitution suggests that there has to be an emergence of constitutional governance which would gradually grow to give rise to constitutional renaissance."

11. Lokur, J. opined: (Manoj Narula case [Manoj Narula v. Union of India, (2014) 9 SCC 1] , SCC pp. 70-71, para 132)

"132. While it may be necessary, due to the criminalisation of our polity and consequently of our politics, to ensure that certain persons do not become Ministers, this is not possible through guidelines issued by this Court. It is for the electorate to ensure that suitable (not merely eligible) persons are elected to the legislature and it is for the legislature to enact or not enact a more restrictive law."

Proceeding further, the learned Judge stated: (SCC p. 72, para 137)

"137. In this respect, the Prime Minister is, of course, answerable to Parliament and is under the gaze of the watchful eye of the people of the country. Despite the fact that certain limitations can be read into the Constitution and have been read in the past, the issue of the appointment of a suitable person as a Minister is not one which enables this Court to read implied limitations in the Constitution."

12. Lokur, J. had also, in his opinion in Manoj Narula case [Manoj Narula v. Union of India, (2014) 9 SCC 1] , reproduced the words of Dr B.R. Ambedkar in the Constituent Assembly on 25-11-1949 and the sentiments echoed by Dr Rajendra Prasad on 26-11-1949. Dr Ambedkar had said: (SCC pp. 72-73, para 138)

"138. ... 'As much defence as could be offered to the Constitution has been offered by my friends Sir Alladi Krishnaswami Ayyar and Mr T.T. Krishnamachari. I shall not therefore enter into the merits of the Constitution. Because I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be

a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics. Who can say how the people of India and their parties will behave? Will they uphold constitutional methods of achieving their purposes or will they prefer revolutionary methods of achieving them? If they adopt the revolutionary methods, however good the Constitution may be, it requires no prophet to say that it will fail. It is, therefore, futile to pass any judgment upon the Constitution without reference to the part which the people and their parties are likely to play.' (CAD Vol. 11, p. 975)"

13. The learned Judge Lokur, J. in Manoj Narula case [Manoj Narula v. Union of India, (2014) 9 SCC 1] reproduced the words of Dr Rajendra Prasad, which ring till today: (Manoj Narula case [Manoj Narula v. Union of India, (2014) 9 SCC 1] , SCC p. 73, para 139)

"139. ... 'Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. It is a trite saying that a country can have only the Government it deserves. Our Constitution has provisions in it which appear to some to be objectionable from one point or another. We must admit that the defects are inherent in the situation in the country and the people at large. If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them.' (CAD Vol. 11, p. 993)"

14. Kurian Joseph, J., in Manoj Narula case [Manoj Narula v. Union of India, (2014) 9 SCC 1] concurring with the opinion, has stated: (Manoj Narula case [Manoj Narula v. Union of India, (2014) 9 SCC 1] , SCC p. 76, para 152)

"152. No doubt, it is not for the Court to issue

any direction to the Prime Minister or the Chief Minister, as the case may be, as to the manner in which they should exercise their power while selecting the colleagues in the Council of Ministers. That is the constitutional prerogative of those functionaries who are called upon to preserve, protect and defend the Constitution. But it is the prophetic duty of this Court to remind the key duty holders about their role in working the Constitution. Hence, I am of the firm view, that the Prime Minister and the Chief Minister of the State, who themselves have taken oath to bear true faith and allegiance to the Constitution of India and to discharge their duties faithfully and conscientiously, will be well advised to consider avoiding any person in the Council of Ministers, against whom charges have been framed by a criminal court in respect of offences involving moral turpitude and also offences specifically referred to in Chapter III of the Representation of the People Act, 1951."

15. The thrust of the matter is whether any disqualification can be read as regards disqualification for membership into the constitutional provisions. Article 102(1) specifies certain grounds and further provides that any disqualification can be added by or under any law made by Parliament. Article 191 has the same character.

16. Chapter III of the Representation of the People Act, 1951 (for brevity, "the Act") deals with disqualification for membership of Parliament and the State Legislatures. Section 7 deals with definitions. It is as follows:

"7. Definitions.—In this Chapter—

(a) "appropriate Government" means in relation to any disqualification for being chosen as or for being a member of either House of Parliament, the Central Government, and in relation to any disqualification for being chosen as or for being a member of the Legislative Assembly or Legislative Council of a State, the State Government;

(b) "disqualified" means disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State under the provisions of this Chapter, and on no other ground."

17. The word "disqualified" clearly states that a person be disqualified from being a member under the provisions of the said chapter and/or on no other ground. The words "no other ground" are of immense significance. Apart from the grounds mentioned under

Articles 102(1)(a) to 102(1)(d) and Articles 191(1)(a) to 191(1)(d), the other grounds are provided by Parliament and Parliament has provided under Sections 8, 8-A, 9, 9-A, 10 and 10-A which read thus:

"8. Disqualification on conviction for certain offences.-(1) A person convicted of an offence punishable under-

(a) Section 153-A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or Section 171-E (offence of bribery) or Section 171-E (offence of undue influence or personation at an election) or sub-section (1) or sub-section (2) of Section 376 or Section 376-A or Section 376-B or Section 376-C or Section 376-D (offences relating to rape) or Section 498-A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of Section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code (45 of 1860); or

(b) the Protection of Civil Rights Act, 1955 (22 of 1955), which provides for punishment for the preaching and practice of "untouchability", and for the enforcement of any disability arising therefrom; or

(c) Section 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962 (52 of 1962); or

(d) Sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or

(e) the Foreign Exchange (Regulation) Act, 1973 (46 of 1973); or

(f) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or

(g) Section 3 (offence of committing terrorist acts) or Section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or

(h) Section 7 (offence of contravention of the

provisions of Sections 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988); or

(i) Section 125 (offence of promoting enmity between classes in connection with the election) or Section 135 (offence of removal of ballot papers from polling stations) or Section 135-A (offence of booth capturing) or clause (a) of sub-section (2) of Section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of this Act; or

(j) Section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991, or

(k) Section 2 (offence of insulting the Indian National Flag or the Constitution of India) or Section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971); or

(l) the Commission of Sati (Prevention) Act, 1987 (3 of 1988); or

(m) the Prevention of Corruption Act, 1988 (49 of 1988); or

(n) the Prevention of Terrorism Act, 2002 (15 of 2002);

shall be disqualified, where the convicted person is sentenced to—

(i) only fine, for a period of six years from the date of such conviction;

(ii) imprisonment, from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(2) A person convicted for the contravention of—

(a) any law providing for the prevention of hoarding or profiteering; or

(b) any law relating to the adulteration of food or drugs; or

(c) any provisions of the Dowry Prohibition Act, 1961 (28 of 1961);

and sentenced to imprisonment for not less than six months, shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years other than any offence referred to in sub-section (1) or sub-section (2) shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(4) Notwithstanding anything in sub-section (1), sub-section (2) and sub-section (3) a disqualification under either sub-section shall not, in the case of a person who on the date of the conviction is a member of Parliament or the legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

Explanation.—In this section—

(a) "law providing for the prevention of hoarding or profiteering" means any law, or any order, rule or notification having the force of law, providing for—

(i) the regulation of production or manufacture of any essential commodity;

(ii) the control of price at which any essential commodity may be brought or sold;

(iii) the regulation of acquisition, possession, storage, transport, distribution, disposal, use or consumption of any essential commodity;

(iv) the prohibition of the withholding from sale of any essential commodity ordinarily kept for sale;

(b) "drug" has the meaning assigned to it in the Drugs and Cosmetics Act, 1940 (23 of 1940);

(c) "essential commodity" has the meaning assigned to it in the Essential Commodities Act, 1955 (10 of 1955);

(d) "food" has the meaning assigned to it in the

Prevention of Food Adulteration Act, 1954 (37 of 1954).

8-A. Disqualification on ground of corrupt practices.—

(1) The case of every person found guilty of a corrupt practice by an order under Section 99 shall be submitted, as soon as may be within a period of three months from the date such order takes effect, by such authority as the Central Government may specify in this behalf, to the President for determination of the question as to whether such person shall be disqualified and if so, for what period:

Provided that the period for which any person may be disqualified under this sub-section shall in no case exceed six years from the date on which the order made in relation to him under Section 99 takes effect.

(2) Any person who stands disqualified under Section 8-A of this Act as it stood immediately before the commencement of the Election Laws (Amendment) Act, 1975 (40 of 1975), may, if the period of such disqualification has not expired, submit a petition to the President for the removal of such disqualification for the unexpired portion of the said period.

(3) Before giving his decision on any question mentioned in sub-section (1) or on any petition submitted under sub-section (2), the President shall obtain the opinion of the Election Commission on such question or petition and shall act according to such opinion.

9. Disqualification for dismissal for corruption or disloyalty.—(1) A person who having held an office under the Government of India or under the Government of any State has been dismissed for corruption or for disloyalty to the State shall be disqualified for a period of five years from the date of such dismissal.

(2) For the purposes of sub-section (1), a certificate issued by the Election Commission to the effect that a person having held office under the Government of India or under the Government of a State, has or has not been dismissed for corruption or for disloyalty to the State shall be conclusive proof of that fact:

Provided that no certificate to the effect that a person has been dismissed for corruption or for disloyalty to the State shall be issued unless an opportunity of being heard has been given to the said person.

9-A. Disqualification for Government contracts, etc.—A person shall be disqualified if, and for so long as, there subsists a contract entered into by him in the course of his trade or business with the appropriate Government for the supply of goods to, or for the execution of any works undertaken by, that Government.

Explanation.—For the purposes of this section, where a contract has been fully performed by the person by whom it has been entered into with the appropriate Government, the contract shall be deemed not to subsist by reason only of the fact that the Government has not performed its part of the contract either wholly or in part.

10. Disqualification for office under Government company.—A person shall be disqualified if, and for so long as, he is a managing agent, manager or secretary of any company or corporation (other than a cooperative society) in the capital of which the appropriate Government has not less than twenty-five per cent share.

10-A. Disqualification for failure to lodge account of election expenses.—If the Election Commission is satisfied that a person—

(a) has failed to lodge an account of election expenses within the time and in the manner required by or under the Act, and

(b) has no good reason or justification for the failure,

the Election Commission shall, by order published in the Official Gazette, declare him to be disqualified and any such person shall be disqualified for a period of three years from the date of the order."

18. From the aforesaid, it is decipherable that Section 8 deals with disqualification on conviction for certain offences. Section 8-A provides for disqualification on ground of corrupt practices. Section 9 provides for the disqualification for dismissal for corruption or disloyalty. Section 9-A deals with the situation where there is subsisting contract between the person and the appropriate government. Section 10 lays down disqualification for office under government company and Section 10-A deals with disqualification for failure to lodge account of election expenses. Apart from these disqualifications,

there are no other disqualifications and, as is noticeable, there can be no other ground. Thus, disqualifications are provided on certain and specific grounds by the legislature. In such a state, the legislature is absolutely specific.

19. The submission of the learned counsel appearing for the petitioners is that the law-breakers should not become law-makers and there cannot be a paradise for people with criminal antecedents in Parliament or the State Legislatures. Reference has been made to the recommendations of the Law Commission which has seriously commented on the prevalent political atmosphere being dominated by people with criminal records.

20. It has also been highlighted by the petitioners that criminalisation in politics is on the rise and the same is a documented fact and recorded by various committee reports. The petitioners also highlight that the doctrine of fiduciary relationship has been extended to several constitutional posts and that if members of Public Service Commission, Chief Vigilance Commissioner and the Chief Secretary can undergo the test of integrity check and if "framing of charge" has been recognised as a disqualification for such posts, then there is no reason to not extend the said test of "framing of charge" to the posts of Members of Parliament and State Legislatures as well. To further accentuate this stand, the petitioners point out that such persons hold the posts in constitutional trust and can be made subject to rigours and fetters as the right to contest elections is not a fundamental right but a statutory right or a right which must confirm to the constitutional ethos and principles.

21. The petitioners are attuned to the principle of "presumption of innocence" under our criminal law. But they are of the opinion that the said principle is confined to criminal law and that any proceeding prior to conviction, such as framing of charge for instance, can become the basis to entail civil liability of penalty. The petitioners, therefore, take the stand that debarring a person facing charges of serious nature from contesting an election does not lead to creation of an offence and it is merely a restriction which is distinctively civil in nature.

22. The intervenor organisation has also made submissions on a similar note as that of the petitioners to the effect that persons charged for an offence punishable with imprisonment for five years or

more are liable to be declared as disqualified for being elected or for being a Member of Parliament as a person charge-sheeted in a crime involving moral turpitude is undesirable for a job under the government and it is rather incongruous that such a person can become a law-maker who then control civil servants and other government machinery and, thus, treating legislators on a different footing amounts to a violation of Article 14 of the Constitution.

23. Mr Venugopal, learned Attorney General for India, refuting the aforesaid submission, would urge that Parliament may make law on the basis of the recommendations of the Law Commission but this Court, as a settled principle of law, should not issue a mandamus to Parliament to pass a legislation and can only recommend. That apart, submits Mr Venugopal, that when there are specific constitutional provisions and the statutory law, the Court should leave it to Parliament.

24. It is well settled in law that the court cannot legislate. Emphasis is laid on the issuance of guidelines and directions for rigorous implementation. With immense anxiety, it is canvassed that when a perilous condition emerges, the treatment has to be aggressive. The petitioners have suggested another path. But, as far as adding a disqualification is concerned, the constitutional provision states the disqualification, confers the power on the legislature, which has, in turn, legislated in the imperative."

24. In the light of the statutory provisions, and the orders passed by this Court in Crl.O.P.No.1125 of 2018 and Crl.O.P.Sr.No.6139 of 2019 respectively, extracted in the foregoing paragraphs, facts stated in the supporting affidavit to this writ petition, are nothing but repetition, the same cannot be considered, for issuance of Mandamus. Prayer sought for, is rejected.

25. In view of the above, writ petition is dismissed. No Costs. Consequently, the connected writ miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

dm

To

1.Chief Election Commissioner
Election Commission of India,
Nirvan Chadhan
Asoka Road, New Delhi.

2.Chief Election Commissioner,
State of Tamil Nadu
Fort St George, Secretariat,
Chennai 600 009.

3.The Returning Officer,
District Collector of Dindigul
Dindigul Constituency 624 004.

W.P.No.11744 of 2019
and
W.M.P.No.11953 of 2019

CSL/22.04.2019



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